

5. A New Statutory Framework for Public Inquiries

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Introduction

5.1 One of the main issues for the ALRC in this Inquiry is whether the current arrangements for conducting federal public inquiries, including Royal Commissions, are appropriate, or whether a new statutory model is necessary. In this chapter, the ALRC considers whether, and how, to reform the statutory framework. It canvasses stakeholder views on new models of public inquiry in Australia, and recommends several features of a new model for public inquiries. In Chapter 13, the ALRC makes several recommendations specifically directed towards inquiries dealing with issues of national security.

The current arrangements for public inquiries

5.2 The Australian Government may establish inquiries in several ways. Only certain inquiries, however, have coercive powers.¹ While the executive has the prerogative power to establish public inquiries, this power does not extend to establishing inquiries with coercive powers. Such powers are conferred on public inquiries by legislation enacted by the Australian Parliament.²

5.3 Currently, statutory public inquiries may be established under:

- the *Royal Commissions Act 1902* (Cth) (for example, the HIH Royal Commission (2003); Royal Commission into the Building and Construction Industry (2003); and the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry));
- legislation that confers on a particular inquiry specific powers and protections contained in the *Royal Commissions Act* (for example, the Equine Influenza Inquiry (2008) was established under the amended *Quarantine Act 1908* (Cth));
- legislation that provides the executive with the power to establish an inquiry in a general area (for example, the Inquiry into the Manner in which DFAT has dealt with Allegations of Paedophile Activities (1996) (Commonwealth Paedophile Inquiry) was established under the *Public Service Act 1922* (Cth)); and
- legislation establishing permanent bodies to undertake inquiries into a specific area (for example, the *Ombudsman Act 1976* (Cth) provides the Commonwealth Ombudsman with powers to consider and investigate complaints about Australian Government departments and agencies, and the *Inspector-General of Intelligence and Security Act 1986* (Cth) provides the Inspector-General of Intelligence and Security (IGIS) with powers to inquire into the activities of certain intelligence agencies).

5.4 In addition, the Australian Government may establish inquiries without statutory foundation, such as taskforces, committees, panels and departmental and ministerial inquiries. These inquiries may be established to provide advice or develop policy on a diverse range of matters. Examples of this kind of non-statutory policy inquiry include the National Human Rights Consultation (2009) and the Access Card Consumer and Privacy Taskforce (2006).

1 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

2 The *Royal Commissions Act 1902* (Cth) was enacted by the Australian Parliament under s 51(xxxix) of the *Australian Constitution*, which confers on the Australian Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to matters incidental to the execution of powers vested in the legislature, executive or judicature.

5.5 The Australian Government may also establish investigatory inquiries without statutory foundation. Recent examples of this type of inquiry include the Inquiry into the Case of Dr Mohamed Haneef (2008) (Clarke Inquiry) and the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005).

5.6 Finally, a number of inquiries relevant to Australian Defence Force personnel and matters may be established under the *Defence (Inquiry) Regulations 1985* (Cth). The *Defence (Inquiry) Regulations* are discussed further in Chapter 4, but detailed discussion of these regulations falls outside the scope of this Inquiry.

Is there a need for a new statutory framework?

5.7 Public inquiries have a range of functions, discussed in Chapter 2. In this Inquiry, however, the ALRC has noted a number of shortcomings with the current arrangements for inquiries in Australia. For example, non-statutory inquiries usually have no recourse to the powers necessary to investigate relevant matters.³ Also, non-statutory inquiries may not provide adequate legal protection to inquiry members and staff. Further, non-statutory inquiries generally do not have the same level of public input as Royal Commissions or other statutory inquiries. In part, this may be a result of insufficient protection afforded to individuals providing information in a public forum—and the lack of consequences for failing to provide information. Consequently, non-statutory inquiries may not have all the information necessary to make the best recommendations.

5.8 There are also issues with statutory inquiries commenced other than under the *Royal Commissions Act*. For example, the *Quarantine Act* was amended to confer on the Equine Influenza Inquiry most, but not all, of the powers contained in the *Royal Commissions Act*. That inquiry also was able to exercise powers under the *Quarantine Act*. Further, the powers available to inquiries not established under the *Royal Commissions Act* are not necessarily equivalent to those enjoyed by Royal Commissions. For example, the Commonwealth Paedophile Inquiry has been criticised on the basis that it did not have adequate powers and protections—including the power to compel a person to give evidence that may tend to incriminate himself or herself.⁴

5.9 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC concluded that there was a need for a new statutory framework for public inquiries in Australia.

3 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [5.7]. See also A Lynch, *Learning from Haneef* (2009) Inside Story <<http://inside.org.au>> at 4 August 2009. The ALRC discusses coercive powers in detail in Ch 11.

4 B Bailey, *Examples of Public Sector Inquiries—Commonwealth Paedophile Inquiry* (1996–1997) Department of the Parliamentary Library, Information and Research Services, 13–17.

Submissions and consultations

5.10 There was overwhelming support amongst stakeholders for retaining the highest statutory form of public inquiry—a Royal Commission—as an essential aspect of accountable and transparent government.⁵ For example, the Community and Public Sector Union (CPSU) noted that, through their public nature and degree of independence, Royal Commissions ‘enhance Australian democracy’.⁶ The Law Council of Australia (Law Council) submitted that the ‘robust public scrutiny’ of governments that may be undertaken by Royal Commissions ‘has become increasingly critical in the context of expanding executive power’.⁷

5.11 In addition, there was very strong support among stakeholders for a statutory basis for some non-Royal Commission forms of public inquiry. For example, the Law Council expressed concern that:

[f]or decades, there has been a trend towards establishing public inquiries without any statutory framework at all. This lack of statutory framework, and corresponding lack of information gathering powers and protections for witnesses, can lead to a lack of public confidence in the ability of the inquiry to obtain all relevant information, despite the integrity of the inquiry head.⁸

5.12 The Law Council went on to note that further consideration should be given to the adoption of legislation that would enable Commonwealth public inquiries to be vested with statutory powers and provided with a statutory framework.

5.13 Similarly, the CPSU emphasised that it was important for some public inquiries to have access to coercive powers.

One of the more controversial aspects of the recent Clarke Inquiry into the detention of Mohamed Haneef was that the Inquiry was not a Royal Commission. This controversy demonstrates ... that the effectiveness of an inquiry is intrinsically linked to the powers on which the inquiry can rely.⁹

5.14 Mr Graham Millar noted there may not be a need for ‘an Act to cover inquiries that do not require coercive powers’. For those inquiries that do require such powers, however,

[t]here is a clear need for an Act to provide the authority for the executive government to appoint a person (or persons) to conduct a high level independent inquiry, and for that person(s) to have the necessary coercive powers to obtain information. ... In most cases, such inquiries are conducted openly and, inevitably, they attract considerable public following. Particularly in view of the availability of coercive powers, the Act

5 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

6 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

7 Law Council of Australia, *Submission RC 9*, 19 May 2009.

8 Ibid.

9 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

should provide the person(s) conducting the inquiry, and those assisting the inquiry, with appropriate protections and immunities.¹⁰

5.15 Other stakeholder concerns about the current framework related to uncertainty about the nature of non-statutory and statutory inquiries not entitled ‘Royal Commissions’. For example, some stakeholders queried whether the AWB Inquiry was in fact a Royal Commission, and if so, why the formal title of the inquiry did not include the term.¹¹ A number of stakeholders expressed surprise upon discovering that the Clarke Inquiry did not enjoy the same powers and protections as inquiries established under the *Royal Commissions Act*. Others suggested that other forms of public inquiry may not enjoy the same perception of independence as Royal Commissions.

5.16 Liberty Victoria submitted that the

array of models is confusing and poorly understood (if at all) by the general public ... At present, the *Royal Commissions Act* is used as a reference point for other forms of inquiry. While this is a useful device, it also leads to a great deal of confusion as it dilutes the image of Royal Commissions and confuses the public as to the nature and powers of those public inquiries which exercise some, but not all, of the powers under the *Royal Commissions Act*.¹²

5.17 On the other hand, some stakeholders were concerned that a new statutory framework may diminish the importance of Royal Commissions. Millar submitted that the introduction of another type of inquiry would not

provide any more flexibility, any less formality or any greater cost-effectiveness than the current arrangements and it may add to the confusion that can occur in distinguishing between the many types of government inquiries and reviews that are conducted. I consider that the better approach would be to refine, improve and modernise the current provisions covering Royal Commissions.¹³

5.18 The Australian Government Solicitor (AGS) was concerned about ‘over-regulating’ public inquiries. With respect to the particular model proposed by the ALRC, discussed below, the AGS was of the view ‘that no real advantage would be obtained over the retention of the current Act and its application to particular inquiries as may be considered appropriate’.¹⁴

10 G Millar, *Submission RC 5*, 17 May 2009.

11 The Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme was established by Letters Patent issued by the Governor-General on 10 November 2005 in accordance with s 1A of the *Royal Commissions Act 1902* (Cth).

12 Liberty Victoria, *Submission RC 1*, 6 May 2009.

13 G Millar, *Submission RC 21*, 21 September 2009.

14 Australian Government Solicitor, *Submission RC 31*, 6 October 2009.

ALRC's view

5.19 The ALRC remains of the view that reform in this area is necessary. First, many non-Royal Commission forms of public inquiry need access to coercive information-gathering powers, such as compelling a person to appear and provide answers to an inquiry, to ensure the efficient investigation of a particular issue or event. Secondly, legal protections are necessary to ensure that the way information is collected in an inquiry reflects an appropriate balance between the need to determine the facts and protecting the rights of individuals involved with, or affected by, the inquiry. Finally, legal protections can help to prevent inquiry members and staff from suffering detriment through being appointed to, or employed by, an inquiry.

5.20 Further, stakeholders expressed concern that non-statutory inquiries do not enjoy the same public perception of independence as statutory inquiries. Stakeholders also indicated confusion about the nature, powers and protections of statutory and non-statutory inquiries not called 'Royal Commissions'. These views, taken together, strongly indicate a need for greater clarity around the arrangements for establishing, conducting and concluding public inquiries.

5.21 While the ALRC supports the continued existence of the highest form of public inquiry, it is not desirable to commence all public inquiries under the existing *Royal Commissions Act*. Royal Commissions fulfil particular functions, and it would not be desirable to 'dilute' their perceived importance or prestige by commencing all public inquiries as the 'highest' form of executive inquiry. In addition, the Australian Government is often reticent to establish Royal Commissions.¹⁵ These inquiries are frequently lengthy and expensive, and other forms of public inquiry are often established because they provide more flexible, expeditious and cost-effective options.

5.22 Stakeholders also expressed concerns that Royal Commissions may be diminished by the introduction of another form of statutory inquiry. The executive, however, regularly establishes non-Royal Commission forms of inquiry and there is little evidence that these inquiries diminish the importance of Royal Commissions. On balance, it is the ALRC's view that there should be a new framework that accommodates both Royal Commissions and other public inquiries. As a principal reason for the introduction of such a framework is to ensure appropriate access to coercive powers, and such powers may be conferred on public inquiries only by legislation, this framework should be of a statutory character. Another advantage of a statutory framework is that it can clearly set out other issues related to public inquiries, for example, the protections available to participants.¹⁶

15 Details about the Royal Commissions and other public inquiries established by past and previous Australian Governments are set out in Ch 2.

16 In Ch 12, the ALRC discusses protections for inquiry members and inquiry participants under the recommended statutory framework.

5.23 In the following section, the ALRC considers the most appropriate model for such a statutory framework.

Options for reform

5.24 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked, if the Australian Government were to introduce a new statutory framework for conducting public inquiries, should the most appropriate model take the form of:

- a general inquiries statute;
- a dual statutory structure;
- a permanent inquiries body; or
- another option?¹⁷

A general inquiries statute

5.25 In IP 35, the ALRC suggested that one option for reforming the current federal model would be to replace the *Royal Commissions Act* with a general Act for public inquiries.¹⁸ The Act could provide for the establishment of all public inquiries, regardless of the nature of the inquiry or the powers that it requires.¹⁹ A general inquiries statute could also contain separate sections dealing with inquiries that are less formal than a Royal Commission. A statute of this nature would be similar to the Canadian and proposed New Zealand models for public inquiry discussed in Chapter 4.

5.26 An advantage of a general inquiries statute may be that it provides a cohesive framework for all public inquiries with respect to: inquiry hearings and other procedures; the review of decisions; and consistent government responses to inquiry recommendations.

5.27 There may be some drawbacks, however, to such an approach.²⁰ For example, Mr Tom Sherman has noted that there may be ‘an inevitable tendency to give all relevant powers and protections to the official inquiry with the result that it becomes a royal commission in disguise’.²¹

17 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Questions 5–1, 5–2.

18 *Ibid.*, [5.5].

19 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [3.12].

20 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.8].

21 T Sherman, *Executive Inquiries in Australia—Some Proposals for Reform (Law and Policy Paper No 8)* (1997) Australian National University—Centre for International and Public Law, 18.

Dual statutory structure

5.28 In IP 35, the ALRC suggested that another way to address the issues with the current model is to retain the *Royal Commissions Act* and enact another statute to provide for the establishment of non-Royal Commission forms of inquiry with a range of powers and protections. The ALRC noted that a dual statutory structure would have the advantage of preserving the Royal Commission model and its associated prestige, while at the same time providing a flexible statutory framework for other public inquiries. On the other hand, this approach may unnecessarily preserve fundamental problems with the current Royal Commission model. Further, a dual statutory structure may result in unnecessary fragmentation of regulation.²²

Permanent inquiry bodies

5.29 The third option suggested by the ALRC in IP 35 was to establish a new permanent body to conduct some or all public inquiries, or to task an existing body (or bodies) with conducting these inquiries.²³ The ALRC queried whether this task may be carried out more effectively and appropriately by standing bodies, rather than ad hoc inquiries.²⁴ For example, in the context of law reform, Justice Ronald Sackville has suggested that permanent law reform bodies are under utilised in the formulation of legal policy.²⁵

5.30 The ALRC noted that the advantages of a permanent inquiries body include the: potential saving of costs in setting up an inquiry; retention of institutional knowledge; and capacity to conduct preliminary research to determine whether a full inquiry is necessary.²⁶ On the other hand, it suggested that there may not be a consistent or ongoing need for a standing body. Royal Commissions are established relatively infrequently, and maintaining a permanent inquiries body may be an inefficient use of resources. Further, it may be better to attract and appoint staff, and determine the administrative structure and powers of each inquiry, on an ‘as needs’ basis.²⁷

Discussion Paper proposal

5.31 Submissions and consultations on IP 35 did not indicate one clearly favoured statutory model for ad hoc public inquiries. In DP 75, the ALRC proposed that Royal Commissions and other public inquiries should be established under a general inquiries

22 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.9]–[5.10].

23 Ibid, [5.12].

24 Ibid, [4.20].

25 R Sackville, ‘Law Reform Agencies and Royal Commissions: Toiling in the Same Field’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 285–286.

26 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.13]. See also Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [2.38]–[2.46].

27 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.13]. See also Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [2.38]–[2.46].

statute that makes provision for two tiers of ad hoc public inquiry.²⁸ It also asked whether there should be a mechanism in place by which the jurisdiction and powers of existing bodies, such as the Commonwealth Ombudsman and the IGIS, could be expanded temporarily to conduct particular public inquiries.²⁹

Submissions and consultations

General inquiries statute

5.32 Several stakeholders with whom the ALRC consulted supported the introduction of a general inquiries statute.³⁰ In its submission on IP 35, Liberty Victoria expressed the view that all public inquiries should ‘be created by reference to the one piece of legislation’.

This would avoid confusion and allow the public (and anyone involved in an inquiry) to understand the nature of the inquiry and its place within the broader scheme of public inquiries. This may lead to cost savings for all involved and would streamline the formation and conduct of inquiries.³¹

5.33 In its submission on DP 75, Liberty Victoria submitted:

The proposed *Inquiries Act* represents an innovative and contemporary means of holding Government to account. It is important that civil liberties are not eroded by the process of inquiry and Liberty believes the ALRC’s proposals largely succeed in balancing civil liberties against effective public inquiries.³²

5.34 The Law Council initially supported a dual statutory structure, but noted that the ALRC’s proposal in DP 75 ‘effectively meets its concerns about the need for a statutory basis for both forms of inquiries’. It expressed support for

a Commonwealth *Inquiries Act* as a mechanism to provide robust public scrutiny of government action. The Law Council considers that Royal Commissions and Official Inquiries conducted under the *Inquiries Act* should: be as open and accessible to the public as possible; have access to all relevant information; employ transparent and fair processes; and be conducted at arm’s-length from the Executive. The proposed Official Inquiries should be able to be undertaken reasonably expediently, and be less expensive and more flexible than Royal Commissions so that they present an appropriate alternative for relevant inquiries.³³

5.35 A number of other stakeholders made submissions that indicated broad support for the model proposed in DP 75.³⁴ As noted above, the AGS did not see a need for

28 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–1.

29 Ibid, Question 5–1.

30 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

31 Liberty Victoria, *Submission RC 1*, 6 May 2009.

32 Liberty Victoria, *Submission RC 26*, 27 September 2009.

33 Law Council of Australia, *Submission RC 30*, 2 October 2009.

34 See, eg, Accountability Round Table, *Submission RC 29*, 30 September 2009; Australian Intelligence Community, *Submission RC 28*, 28 September 2009; Community and Public Sector Union, *Submission RC 25*, 22 September 2009; Australian Collaboration, *Submission RC 24*, 22 September 2009.

reform of the statutory framework, nor did it support the model proposed by the ALRC.³⁵

Dual statutory structure

5.36 The Department of Immigration and Citizenship (DIAC) supported a dual statutory structure,

[DIAC] sees value in preserving the *Royal Commissions Act* as a separate piece of legislation which retains the full complement of powers and protections of current Royal Commissions. In addition, DIAC sees value in the creation of an additional general statute which would underpin the creation and operation of general ad-hoc public inquiries and would provide minimum protections and ability to adjust powers to best achieve the inquiry's terms of reference.³⁶

A new permanent inquiries body

5.37 DIAC also supported the establishment of a permanent inquiries body to conduct Royal Commissions and other public inquiries, noting that the benefits of such a body would include cost savings, administrative expertise and independence.³⁷ Few of those with whom the ALRC consulted, however, supported the establishment of a permanent inquiries body.³⁸ Millar submitted that, while it would be useful to have readily available expertise for the conduct and support of inquiries, a permanent inquiries body established 'solely for that purpose' was unlikely to be cost-effective. Further,

[p]ersons conducting inquiries are appointed for their particular qualifications, expertise and standing in relation to the subject of the inquiries. It is unlikely that members of a permanent inquiry body would have the range of expertise required to conduct a diversity of inquiries. There may also be questions about the independence of members of a permanent inquiry body.³⁹

Use of existing inquiry bodies

5.38 Some stakeholders supported the practice of referring some inquiries to standing bodies. For example, while supporting a general inquiries statute, Liberty Victoria submitted that:

Depending on the nature of the public inquiry, there is also merit in the use of standing bodies such as the ALRC, Ombudsman and others. However, such bodies must be independent and have guaranteed funding to ensure their independence (perceived and actual) from government.⁴⁰

35 Australian Government Solicitor, *Submission RC 31*, 6 October 2009.

36 Department of Immigration and Citizenship, *Submission RC 11*, 20 May 2009.

37 Ibid.

38 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

39 G Millar, *Submission RC 5*, 17 May 2009.

40 Liberty Victoria, *Submission RC 1*, 6 May 2009. See also Liberty Victoria, *Submission RC 26*, 27 September 2009.

5.39 The IGIS and the Australian Intelligence Community (AIC) noted that the Office of the IGIS was an appropriate body to undertake public inquiries into matters of national security. For example, the AIC submitted that:

The IGIS has the standing powers of a Royal Commission and was established specifically to provide a mechanism for independent oversight of the intelligence community, where direct and open accountability to the public is not always possible. The IGIS can require any person to answer questions and produce relevant documents, can take sworn evidence and is able to enter the premises of any AIC agency. The IGIS can also access any information deemed relevant to the review function, including ministerial directions and authorisations to agencies. The IGIS also conducts all inquiries in private. As the IGIS also holds appropriate security clearances, and has a range of approaches available for the conduct of an inquiry (either by own-motion or at the request of government), the AIC considers the IGIS is a natural first option to pursue a line of inquiry into the AIC or its activities.⁴¹

5.40 The IGIS drew attention to

the great difference in cost between [the Office of the IGIS], a standing body which is flexible and inquisitorial in approach, and ad hoc inquiries and Royal Commissions which are relatively formal, borrow significantly from the common law adversarial approach, engage commissioners and significant numbers of lawyers at substantial rates of pay, and must be established anew on every occasion.⁴²

5.41 Similarly, the Australian Commission for Law Enforcement Integrity (ACLEI) noted that s 71 of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) provides an existing mechanism for commencing public inquiries relating to integrity and corruption in certain law enforcement agencies. ACLEI noted that its staff could be a useful resource to Royal Commissions and Official Inquiries on ‘investigative strategy and specialised legal issues’.

The exercise of intrusive, covert powers in conjunction with coercive hearings requires considerable experience, and the establishment of systems and cooperative arrangements to support their effectiveness. It would be inadvisable for Inquiries to be given these types of powers without strategic and technical support.⁴³

5.42 Mr Don McKenzie submitted that there were resourcing, jurisdictional and procedural issues in using existing bodies such as ACLEI to conduct inquiries. He suggested that, in its current circumstances, ACLEI

would not provide a strong administrative basis to provide support for the establishment and administration of ad hoc inquiries. A new anti-corruption agency, with a broader jurisdiction generating a steady stream of capacity developing work may be in a better position to provide this support, particularly if this additional role

41 Australian Intelligence Community, *Submission RC 28*, 28 September 2009. See also Australian Intelligence Community, *Submission RC 12*, 2 June 2009; Inspector-General of Intelligence and Security, *Submission RC 2*, 12 May 2009.

42 Inspector-General of Intelligence and Security, *Submission RC 2*, 12 May 2009.

43 Australian Commission for Law Enforcement Integrity, *Submission RC 18*, 14 September 2009.

was contemplated and provided for, legislatively and administratively, at the time of its establishment.⁴⁴

5.43 Mr Kym Bills submitted:

the ATSB [Australian Transport Safety Bureau] and Inspector of Transport Security already undertake inquiries/investigations to a high standard and perhaps it would be more efficient to augment the relevant legislation (for example to allow for the possibility of hearings that are protected legally) than to face public pressure to set up a likely more expensive inquiry under the proposed *Inquiries Act*.⁴⁵

5.44 In addition, the Commonwealth Ombudsman submitted that:

Where the proposed scope of an inquiry is broadly consistent with what is already able to be done by an oversight agency, another option might be that the oversight agency could be tasked with the whole of the inquiry, and given any necessary, temporary, expansion to its powers, functions and resources for the purpose of conducting the inquiry. The temporary powers and functions could become operative when, for example, a Minister makes a request to the agency or when Parliament (or a Committee) so determines.⁴⁶

5.45 The Commonwealth Ombudsman suggested that the minister responsible for administering the *Ombudsman Act* should be able to initiate such an expansion by referring a matter to the Commonwealth Ombudsman for inquiry. It noted that, in Victoria, either House or a Committee of the Parliament can refer a matter to the Ombudsman of Victoria. The Commonwealth Ombudsman did not prefer this approach.

Under that procedure the Ombudsman could be required to investigate matters that are not related to the standard jurisdiction of the Ombudsman. There is also a risk that the Ombudsman could be drawn inappropriately into a political controversy, especially if the upper house is not controlled by the Government.⁴⁷

5.46 On the other hand, Millar had

serious doubts about the appropriateness and practicality of the executive government temporarily expanding the jurisdiction and powers of existing bodies to conduct executive inquiries, particularly when the Parliament has specified the jurisdiction and powers of those bodies in their enabling legislation.⁴⁸

ALRC's view

5.47 A new permanent inquiries body should not be established to conduct public inquiries. Public inquiries, and investigatory inquiries in particular, are established by

44 D McKenzie, *Submission RC 27*, 28 September 2009.

45 K Bills, *Submission RC 19*, 17 September 2009.

46 Commonwealth Ombudsman, *Submission RC 13*, 4 June 2009.

47 Commonwealth Ombudsman, *Submission RC 32*, 8 October 2009.

48 G Millar, *Submission RC 21*, 21 September 2009.

the Australian Government on an irregular basis.⁴⁹ There may be extended periods without inquiries and other periods in which multiple inquiries are commenced. Further, there are a number of existing standing bodies that have the capacity to conduct investigatory and policy inquiries. The ALRC, therefore, queries whether there is sufficient work to justify the funding of a new inquiries body for ad hoc inquiries.

5.48 Further, Royal Commissions and other public inquiries may differ greatly with respect to both subject matter and process. There may be limited utility in the Australian Government funding a new permanent body staffed by persons with knowledge, skills and experience specific to only certain types of inquiry.

5.49 McKenzie has raised the important issue of the establishment of a permanent anti-corruption agency with a broader jurisdiction than existing bodies. In Chapter 1, the ALRC notes that it is only considering a particular type of ‘public inquiry’—namely, one that is conducted on an ad hoc basis by an entity established by, but external to, the executive arm of government. Whether a permanent agency or inspector should be established to consider matters of integrity and corruption in the Australian Government is a different issue and is outside the terms of reference for this Inquiry.

5.50 The ALRC sees merit, however, in formalising arrangements for the establishment and administrative support of Royal Commissions and other ad hoc public inquiries. This may streamline processes and reduce costs. Arrangements for administrative support are discussed further in Chapter 8.

5.51 In the ALRC’s view, some public inquiries, including inquiries dealing with some national security matters, should be referred to existing statutory bodies, such as the ACLEI, ATSB, IGIS or the Commonwealth Ombudsman.⁵⁰ In some circumstances, it may be appropriate for the legislation establishing such bodies to be amended to address powers and processes for a particular inquiry. The ALRC agrees with Millar that amending the powers and jurisdiction conferred by statute on individual bodies should be done by Parliament on a case-by-case basis. A member of the executive should not be able to confer on a statutory body more intrusive powers and a wider mandate than the Parliament intended. Detailed discussion of the legislation establishing existing standing bodies is outside the scope of this Inquiry.

One inquiries statute

5.52 Royal Commissions and other public inquiries should be established under a general inquiries statute that makes provision for two tiers of ad hoc public inquiry. For

49 In Ch 2, the ALRC discusses the varied nature of the numerous Royal Commissions and other public inquiries that have been established by previous Australian Governments.

50 These issues are discussed in greater detail later in this chapter and in Ch 13. Note that, in the context of national security, the ALRC recommends that the *Inquiries Act* should empower members of Royal Commissions and Official Inquiries, in determining the use or disclosure of information in the conduct of an inquiry, to request advice or assistance from the IGIS with respect to certain matters: Recommendation 13–4.

several reasons, the enactment of a single Act is preferable to multiple statutes—or importing sections of the *Royal Commissions Act* into existing legislation, as occurred in 2007 to enable the establishment of the Equine Influenza Inquiry outside the *Royal Commissions Act*.

5.53 First, a single statute promotes access to the law. It provides a more straightforward way for those affected by inquiries, and others seeking to ascertain the law relevant to inquiries, to access this information through a single entry point. It is preferable for public inquiries that require coercive powers to be established within a clearly identified statutory framework which sets out available powers and privileges, rather than gain access to some powers by reference to that framework.

5.54 Secondly, a single inquiries statute clarifies the relationship between different tiers of inquiry.⁵¹ There may be less scope for separate statutes to explain the correlation, if any, between such inquiries. Further, a single statute reduces unnecessary duplication in drafting. It enhances consistency in regulation when the Act is introduced, and when amendments are made to the regulatory regime. Also, a single statute may be more likely to fall within the administrative responsibility of a single minister, in turn developing administrative consistency from inquiry to inquiry. Ultimately, a single inquiries statute makes good regulatory sense, and may reduce some of the costs associated with regulating public inquiries.

5.55 Finally, a single inquiries statute will preserve the prestige of Royal Commissions. Under the ALRC's recommended framework, Royal Commissions may still be established under inquiries legislation. The sections of the Act addressing Royal Commissions could be contained in a different part from those sections addressing other forms of public inquiry, as is the case in Canadian and proposed New Zealand legislation. Flexibility as to the type of inquiry that may be commenced within a single statute may obviate the concerns that members of the executive have with commencing an inquiry entitled a 'Royal Commission'.

5.56 In the ALRC's view, therefore, the *Royal Commissions Act* should be amended to enable the establishment of two tiers of public inquiry. These legislative amendments would not preclude the executive from establishing other types of executive inquiry, for example, departmental inquiries. This is discussed further in Chapter 6. Amending the *Royal Commissions Act* may require consequential amendments to provisions of other federal legislation that refer to the Act. A number of provisions and regulations that may require consequential amendment are set out in Appendix 6.

51 The relationship between tiers of inquiry is discussed later in this chapter.

5.57 Further, any amendment of the *Royal Commissions Act* should also involve a redrafting of the Act. The Act evinces a variety of drafting styles. Some of its provisions were inserted in the early 1900s, and have remained largely unaltered,⁵² while others were inserted as recently as 2006.⁵³ The older provisions in the Act are archaic and contain outdated language and complex sentence structure that has caused difficulties of judicial interpretation.⁵⁴ In addition, the fact that the Act has been amended on so many occasions means that its structure is somewhat haphazard, and there is no discernible logic to the sequencing or numbering of the Act's provisions.

Titles of inquiries and new inquiries legislation

5.58 Should the title, *Royal Commissions Act*, be retained? Some countries with a similar colonial heritage to Australia, and some Australian states and territories, have Acts that enable the executive to establish ad hoc public inquiries with coercive powers that are not called Royal Commissions. The removal of the word 'royal' from the name of certain public inquiries, and legislation enabling the establishment of public inquiries, may reflect more accurately the status of Australia as an independent, sovereign state.

5.59 The name of legislation enabling the establishment of public inquiries will depend on its content. The Australian Government Office of Parliamentary Counsel provides advice to drafters on naming legislation:

you should take particular care when naming Bills to ensure that the names you choose are as informative as possible (within reason) and do not cause unnecessary confusion to the Parliament or to any other users of legislation. ... this involves avoiding names that could easily be confused with the names of other current Bills.⁵⁵

5.60 Comparative jurisdictions do not use consistent nomenclature. In the United Kingdom, 'inquiries' may be established under the *Inquiries Act 2005* (UK). In Canada, 'public' and 'departmental' inquiries may be established under the *Inquiries Act 1985* (Canada). In New Zealand, currently, 'commissions of inquiry' and 'royal commissions' may be established under the *Commissions of Inquiry Act 1908* (NZ). 'Public' and 'government' inquiries and 'royal commissions' may be established under the *Inquiries Bill 2008* (NZ), which was before the New Zealand Parliament at the time of writing in October 2009. In Singapore, 'commissions' and 'committees' of inquiry may be established under the *Inquiries Act 2007* (Singapore). In Ireland, 'commissions of investigation' may be established under the *Commissions of Investigation Act 2004* (Ireland) and 'tribunals of inquiry' may be established under the *Tribunals of Inquiry (Evidence) Acts* (Ireland).

52 See, eg, *Royal Commissions Act 1902* (Cth) s 1A.

53 See, eg, *Ibid* ss 6AA, 6AB.

54 See, eg, *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, 650–652.

55 Australian Government Office of Parliamentary Counsel, *Drafting Direction No 1.1—Long and Short Titles of Bills and References to Proposed Acts*, 4. This advice is provided to drafters in relation to determining the 'short name' of a Bill. Separate advice is provided to drafters determining the 'long name' of a Bill.

5.61 In DP 75, the ALRC proposed that the *Royal Commissions Act* should be amended rather than repealed, and renamed the *Inquiries Act*.⁵⁶

Submissions and consultations

5.62 In consultations, stakeholders had differing views on whether the *Royal Commissions Act* was an appropriate title for legislation establishing public inquiries. Some stakeholders indicated that the term ‘Royal’ was outdated. Further, it was suggested that the term ‘Royal Commission’ implied the use of the prerogative power, which is misleading given that coercive powers are conferred on Royal Commissions by legislation.

5.63 Stakeholders did not express strong views about an alternative name for the highest form of public inquiry or the legislation establishing such inquiries. Millar thought that, if it were deemed necessary to make a change to the name of the enabling legislation, appropriate names may include ‘Independent Commissions of Inquiry Act’ or ‘Supreme Commissions of Inquiry Act’ on the basis that the name of the legislation would indicate the nature of the inquiry.⁵⁷ Other suggestions for a new name of the highest form of inquiry included ‘Commission of Inquiry’, ‘National Commission’ and ‘Australian National Commission’.⁵⁸

5.64 On the other hand, most stakeholders supported the retention of the term ‘Royal Commission’, whether in legislation establishing public inquiries or the name of the inquiry itself. Frequently, this view was expressed with an acknowledgement that the term may not reflect the independent nature of the Australian system of government. On balance, however, most stakeholders suggested that the term carried with it a certain gravitas and status that had developed over more than a century. The well-understood term provided a straightforward way for the public to distinguish between the highest form of public inquiry and other inquiries. For example, while Liberty Victoria strongly supported change to the model for public inquiries, it submitted that ‘Royal Commission’ is an inquiry title which has ‘high public recognition and respect’.⁵⁹

5.65 In a roundtable discussion at the Northern Territory Law Society it was noted that, following the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), Royal Commissions have a particular significance for Indigenous peoples. For example, calls for a Royal Commission and references to RCIADIC often follow a negative interaction between law enforcement authorities and Indigenous peoples.⁶⁰

56 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–1(b).

57 G Millar, *Submission RC 5*, 17 May 2009.

58 See, eg, Civil Liberties Australia, *Submission RC 17*, 19 May 2009.

59 Liberty Victoria, *Submission RC 1*, 6 May 2009. See also Liberty Victoria, *Submission RC 26*, 27 September 2009.

60 Northern Territory Law Society, *Roundtable*, 22 May 2009.

5.66 As noted above, Millar was of the view that there was no need to reform the model for conducting public inquiries and, therefore, he did not see the need to rename the *Royal Commissions Act*. He was also concerned that '[t]he proposed re-naming of the *Royal Commissions Act 1902* to the *Inquiries Act* might give rise to further confusion'.⁶¹

ALRC's view

5.67 If the ALRC's recommended model is accepted, the title *Royal Commissions Act* would no longer reflect the content of the legislation—which would provide for the establishment of two tiers of public inquiry. The amended Act, therefore, requires a new name.

5.68 The ALRC recommends that new legislation establishing Royal Commissions and other public inquiries should be called the *Inquiries Act*. The ALRC does not agree that this name will give rise to confusion. It is a succinct and accurate description of the nature of the recommended Act. Also, the recommended title does not conflict with titles of existing Commonwealth legislation. Finally, it is broad enough to cover the establishment of Royal Commissions and other forms of public inquiry.

5.69 In relation to the actual titles of each tier of inquiry, the ALRC is reticent to recommend a change to the title, 'Royal Commission'. This is for two main reasons. First, the term 'Royal Commission' is extremely well-known, which means that it is a clear way to communicate to the public the extraordinary nature of such an inquiry. The ALRC notes how important this was in the New Zealand context, where the New Zealand Law Commission (NZLC) recommended the abolition of Royal Commissions with statutory powers, preferring the introduction of 'public' inquiries—very similar to existing Royal Commissions—and 'government' inquiries. The New Zealand Government did not accept this recommendation in full, introducing legislation into the New Zealand Parliament that would enable the establishment of public inquiries, government inquiries *and* Royal Commissions, all with statutory powers.⁶²

5.70 Secondly, the title 'Royal Commission' is helpful in that it indicates how the highest form of public inquiry is established. While Royal Commissions with statutory powers are established under the *Royal Commissions Act* rather than by exercise of the prerogative power, the Act provides that the Governor-General, as the representative of the monarch of Great Britain, is responsible for their establishment. As the ALRC recommends in Chapter 6, the Australian head of state should continue to be responsible for establishing the highest form of public inquiry in Australia. If changes to Australia's system of government result in a change to the way the head of state is chosen—for example, through the election or appointment of a President—it would make sense, at that stage, for the title of the highest form of inquiry to be amended to reflect that position.

61 G Millar, *Submission RC 21*, 21 September 2009.

62 *Inquiries Bill 2008* (NZ).

5.71 The ALRC did not receive any feedback on an appropriate title for the recommended second tier of inquiry. One title that may reflect the nature of this type of inquiry is ‘Official Inquiry’. This title is clearly recognisable and distinct from ‘Royal Commission’. The ALRC does not prefer the term ‘public inquiry’ for the reason that, while material such as terms of reference and reports may be published as part of such an inquiry, it may not be appropriate to hold all inquiry hearings in public.⁶³ The ALRC is also concerned that referring to a second tier of inquiry as a ‘government’, ‘departmental’ or ‘ministerial’ inquiry may cast doubt over the perceived independence of such an inquiry.

5.72 The ALRC acknowledges, however, that the issue of nomenclature requires further consultation and ultimately will be an issue for the political and drafting processes. The priority for the ALRC is to ensure clarity with respect to the features of its recommended two-tier model. For the purposes of this Report, the term ‘Official Inquiries’ will be used to distinguish second tier inquiries from Royal Commissions.

Recommendation 5–1 The *Royal Commissions Act 1902* (Cth) should be:

- (a) amended to provide for the establishment of two tiers of public inquiry—Royal Commissions and Official Inquiries;
- (b) renamed the *Inquiries Act*; and
- (c) updated to reflect modern drafting practices.

Nature of inquiries in the recommended model

5.73 The recommended statutory framework is intended to enhance clarity, transparency and accountability, and preserve, as far as possible, the rights of individuals. As the federal executive already has the prerogative power to establish public inquiries, albeit without formal powers, a statutory framework for inquiries needs to be designed in such a way that ensures its use.

5.74 The Law Council highlighted the importance of this balance, noting that a second tier of inquiry needs to ‘provide effective scrutiny of government action’ but also needs to be

seen as an attractive tool for government to utilise as an alternative to establishing a Royal Commission. This means making sure that inquiries conducted under the Act

63 In Ch 16, the ALRC discusses when it may be appropriate for inquiries to hold hearings in private.

can be undertaken relatively quickly, with less expense and greater flexibility than those conducted under the [*Royal Commissions Act*].⁶⁴

5.75 The statutory framework recommended in this Report has been designed to achieve these aims.

Overview of distinctions between tiers of inquiry

5.76 The ALRC recommends a number of distinctions between each tier of inquiry to ensure that each inquiry has the necessary tools to carry out its investigations without inappropriately infringing on the rights of persons involved with, or affected by, its processes. What coercive powers may be exercised by each tier of inquiry is a key distinction. In Chapter 11, the ALRC includes a table that identifies the specific powers that it recommends may be available to Royal Commissions and those that may be available to Official Inquiries. The other distinctions are discussed in detail in other sections of this Report.

Table 5.1: Distinctions between Royal Commissions and Official Inquiries

Feature	Royal Commissions	Official Inquiries
Established by and reports to	Governor-General	Minister
Powers	Wide range of coercive powers, for example, may apply for warrants to exercise entry, search and seizure powers or to apprehend a person who does not appear	Reduced range of coercive powers
Concurrent inquiries	May have concurrent functions and powers conferred under state and territory laws	May not have concurrent functions and powers conferred under state and territory laws
Privilege against self-incrimination	May be abrogated (with a use immunity)	May not be abrogated
Client legal privilege	May be abrogated as stipulated in Letters Patent	May not be abrogated

Investigatory and policy inquiries

5.77 Since the time of the Whitlam Labor Government, Royal Commissions and other statutory inquiries have rarely been established for the sole purpose of considering matters of policy. There are now several other bodies from whom the executive can obtain independent advice—for example, the ALRC was established in 1975, the Australian Human Rights Commission in 1986, and the Productivity

64 Law Council of Australia, *Submission RC 9*, 19 May 2009.

Commission in 1998. The functions of these bodies include reporting to the executive on policy or law reform matters. Further, parliamentary committees have been utilised for policy advice far more frequently since the 1970s.⁶⁵

5.78 It is anticipated that a key consideration for the executive in deciding whether to establish a Royal Commission or Official Inquiry will be the powers that should be available to the potential inquiry. It follows, therefore, that the recommended framework should be used to establish inquiries that may require coercive powers and the ability to abrogate privileges associated with these powers.

5.79 This approach is not intended to preclude the establishment of a policy inquiry within the recommended statutory framework; nor is it intended to preclude an investigatory inquiry from making policy recommendations related to its findings. As discussed in Chapter 2, inquiries rarely can be characterised as solely ‘investigatory’. For example, the RCIADIC (1991) and the HIH Royal Commission (2003) were tasked primarily with investigating wrongdoing but also made broad recommendations directed towards reforming the criminal justice and corporate governance systems respectively.

Selecting powers and associated privileges for each inquiry

5.80 How should the circumstances in which coercive powers are conferred on inquiries be determined? In 1977, the Law Reform Commission of Canada took the view that Commissions should be armed with coercive powers only when they were undertaking investigatory inquiries of major importance.⁶⁶ In 1966, the Royal Commission on Tribunals of Inquiry in the United Kingdom took a similar view, recommending that the use of coercive powers by inquiries should be limited to ‘matters of vital public importance concerning which there is something in the nature of a nation-wide crisis in confidence’.⁶⁷

5.81 The NZLC, in a recent review of the equivalent New Zealand laws, considered whether inquiries legislation should have a ‘menu’ of powers, procedures and immunities that could be applied to each inquiry on a case-by-case basis. It decided against such a process on the basis that it is not always possible to determine what powers will be required by an inquiry.

For instance, in what appears to be a straightforward policy inquiry, it may not become clear until later that commercial or professional interests will dissuade key witnesses from giving evidence on relevant matters. The menu option also provides

65 See, eg, the discussion of the development of Senate parliamentary committees since 1970 in H Evans, *Harry Evans: My 40 Years of Canberra Joy* (2009) Crikey <<http://www.crikey.com.au/2009/07/24/harry-evans-my-40-years-of-canberra-joy/>> at 24 July 2009.

66 Law Reform Commission of Canada, *Commissions of Inquiry*, Working Paper 17 (1977), 23. See also H Reed, ‘The “Permanent” Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II’ (1995) 2 *Australian Journal of Administrative Law* 157, 157.

67 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), [26].

ground for politically motivated horse-trading and litigation at the inception of, and during an inquiry, around which powers are or are not needed. ... The idea that commissioners may need to go back to Government to seek additional coercive powers in such cases is unattractive, as it may undermine the independence of a commission. Nor would it be appropriate for courts to be able to order additional powers since this could encourage inquiry participants to seek judicial intervention.⁶⁸

5.82 The NZLC concluded that it would be preferable for all inquiries to ‘have recourse to statutory powers should they be needed’.⁶⁹ It was of the view that coercive powers encouraged the cooperation of those involved with an inquiry, and inquiries should have appropriate tools to carry out their tasks. The NZLC also noted that there was no evidence to suggest that such powers had been abused in New Zealand inquiries.⁷⁰ It is worth noting, however, that existing and proposed New Zealand inquiries legislation does not provide for the extensive range of coercive powers that may be exercised under the Australian *Royal Commissions Act*.

5.83 In IP 35, the ALRC asked whether it was desirable for different inquiries to have different powers conferred on them in certain circumstances, and what those circumstances might be.⁷¹ In DP 75, the ALRC rejected the ‘menu of powers’ approach and proposed that the *Inquiries Act* should set out the specific powers that are conferred on Royal Commissions and Official Inquiries.⁷²

Submissions and consultations

5.84 In the context of improving flexibility and minimising costs, DIAC supported inquiries having ‘access to coercive powers that best suit the purpose of the inquiry’. It also noted that:

when selecting coercive powers under statute, there should be a formal approval process where coercive powers can be selected and approved. There should correspondingly be some limitations on what coercive powers can be chosen, for example, powers that should remain within the exclusive realm of Royal Commissions.⁷³

5.85 McKenzie expressed concern that the Australian Government frequently commences inquiries outside the *Royal Commissions Act*. He submitted that, while the ALRC’s proposal for a new *Inquiries Act*

68 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [2.35].

69 Ibid, [2.36].

70 Ibid.

71 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–2.

72 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–2.

73 Department of Immigration and Citizenship, *Submission RC 11*, 20 May 2009.

creates greater flexibility than exists at the moment, making it more likely that governments will operate within the legislation, there remains some significant inflexibility that may culminate in governments continuing to work around the Act.⁷⁴

5.86 McKenzie suggested that a model that allowed the Australian Government to select the powers that may be exercised by a particular inquiry ‘has all the flexibility that governments could possibly ask for’. He suggested:

A hybrid approach might be to have two default tiers. Each will provide a base inquiry operation from which governments can deviate within the confines of the legislation according to the needs of the incident inquiry.⁷⁵

5.87 On the other hand, in its submission on DP 75, Liberty Victoria supported the ALRC’s proposal to ‘set out and delineate the specific powers that are conferred on Royal Commissions or Official Inquiries’.⁷⁶ The Law Council agreed ‘that a suite of powers should be set out for both Royal Commissions and Official Inquiries, with greater powers being available to Royal Commissions’.⁷⁷

5.88 With specific reference to Royal Commissions, the CPSU was strongly of the view that legislation should make clear what powers may be exercised by an inquiry. The chair of the inquiry then should determine how to use the powers conferred by the statute. The CPSU submitted that, if the executive were able to determine which powers were available to an inquiry,

the powers available to one Royal Commission may differ to another. This creates problems in how the findings of a Royal Commission are perceived. If a Royal Commission inquiry is hampered because certain powers were not given to it, the findings of that Commission should not be given the same standing as another Royal Commission which was fully empowered to investigate the issues. It is simply a matter of not comparing like with like.⁷⁸

5.89 The CPSU also was concerned about ‘politicising’ Royal Commissions.

A Government may yield to public pressure to hold a Royal Commission into a particularly controversial issue, but then refuse to grant it the requisite powers to properly conduct the inquiry. The potential for this to occur weakens the legitimacy and standing of Royal Commissions.⁷⁹

74 D McKenzie, *Submission RC 27*, 28 September 2009.

75 *Ibid.*

76 Liberty Victoria, *Submission RC 26*, 27 September 2009.

77 Law Council of Australia, *Submission RC 30*, 2 October 2009.

78 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

79 *Ibid.*

5.90 In consultations, a number of other stakeholders supported the approach taken by the ALRC. As noted above, a number of stakeholders made submissions that generally supported the model proposed in DP 75.⁸⁰

ALRC's view

5.91 While a 'menu of powers' approach is more flexible, in the ALRC's view the Australian Government should not be able to determine what specific powers may be exercised by an inquiry at the time that it establishes that inquiry. As discussed in Chapter 11, Royal Commissions and other public inquiries can often be characterised as 'fishing expeditions'. At the outset of certain inquiries, it may be clear that the inquiry does not require any coercive powers. For example, a policy inquiry such as the National Human Rights Consultation is unlikely to require coercive powers to carry out its task of considering the best form of human rights protection in Australia. It may be less clear at the outset of an investigatory inquiry, however, which specific powers will be necessary for it to carry out its task. Allowing the executive to select and stipulate the specific powers that may be exercised by an inquiry at the time of establishing that particular inquiry may not be the most efficient option. The ALRC agrees with the NZLC that it could increase the likelihood of 'politically motivated horse-trading' about what powers are needed by a particular inquiry.

5.92 While inquiry members may be able to seek, and be granted, additional powers while an inquiry is on foot, there are reasons why this may not be desirable. It may politicise the inquiry process and affect its perceived independence. Amending an inquiry's powers midway through an inquiry may also affect the way in which information is provided.⁸¹ For example, if an inquiry is subsequently given powers to compel a person to provide information, that person then may be able to make a claim for immunity over the use of that information. Also, seeking an extension of powers likely will result in delay, which, among other things, will increase the overall cost of an inquiry.

5.93 While flexibility is important, this should not be the overriding consideration when determining the powers available to an inquiry, and the associated privileges that may be abrogated in that inquiry. Enhancing clarity in the arrangements for establishing and conducting public inquiries is one of the main aims in designing a new statutory framework. The ALRC is concerned that stipulating which powers may be exercised by a particular inquiry will lead to confusion about the nature of inquiries established under the *Inquiries Act*. On the one hand, allowing the executive to determine the specific powers that apply to a particular inquiry may lead to all inquiries being provided with all available coercive powers and the ability to abrogate all associated privileges. There is a risk that inadequate consideration will be given to the

80 See, eg, Accountability Round Table, *Submission RC 29*, 30 September 2009; Australian Intelligence Community, *Submission RC 28*, 28 September 2009; Community and Public Sector Union, *Submission RC 25*, 22 September 2009; Australian Collaboration, *Submission RC 24*, 22 September 2009.

81 These issues are discussed in Part E.

appropriate balance between exercise of powers and infringement of the rights of individuals. On the other hand, the executive may not provide certain inquiries with powers that may be necessary in specific circumstances, limiting that inquiry's capacity for investigation and affecting the perception of independence of inquiries conducted within the recommended statutory framework.

5.94 As discussed in Chapters 11 and 17, it is the ALRC's view that the ability of an inquiry to exercise the most significant coercive powers, and abrogate fundamental privileges, should be available only to Royal Commissions. In other words, only Royal Commissions should have the ability to: exercise powers to authorise the application for entry, search and seizure warrants and for the issue of warrants for the arrest of those who fail to appear before it when called; partially abrogate the privilege against self-incrimination; and, if set out in the Letters Patent, abrogate client legal privilege. One option may be to preserve the full suite of powers for a Royal Commission and allow the executive to select from a 'menu' of powers only when establishing an Official Inquiry. It is highly likely, however, that the executive would routinely allocate to an Official Inquiry the remaining powers. These powers are fundamental to the conduct of an investigatory inquiry, and include the power to compel the attendance of persons and production of documents and other things.⁸²

5.95 It is the ALRC's view that the recommended *Inquiries Act* should set out the powers available to Royal Commissions and Official Inquiries. The ALRC's approach ensures a clear delineation between the two tiers of inquiry. It also has greater flexibility than the current arrangements.

5.96 Under the *Inquiries Act*, the executive may determine whether a Royal Commission or Official Inquiry should be established. The chair of the inquiry will have control over which, when and how powers available to that inquiry under the Act may be exercised.

<p>Recommendation 5-2 The recommended <i>Inquiries Act</i> should set out the specific powers that are conferred on Royal Commissions and Official Inquiries.</p>

Relationship between tiers of inquiry

5.97 An important element of the ALRC's recommended statutory model is the relationship between Royal Commissions and Official Inquiries, and the relationship between these inquiries and other inquiries that are established outside the ALRC's

⁸² A full list of the powers that the ALRC recommends should be available to Royal Commissions and Official Inquiries, and the application of privileges associated with those powers, is set out in a table in Ch 11.

recommended statutory model. Very little feedback was received by the ALRC on these issues.

5.98 In IP 35, the ALRC noted that the *Inquiries Act* (UK) enables the ‘conversion’ of an inquiry commenced other than under the Act to an inquiry under the Act.⁸³ A converted inquiry enjoys the same powers and protections as an inquiry commenced under the Act.⁸⁴ The process for the conversion of an inquiry is set out in s 15 of the *Inquiries Act* (UK):

(1) Where—

(a) an inquiry (‘the original inquiry’) is being held, or is due to be held, by one or more persons appointed otherwise than under this Act,

(b) a Minister gives a notice under this section to those persons, and

(c) the person who caused the original inquiry to be held consents,

the original inquiry becomes an inquiry under this Act as from the date of the notice or such later date as may be specified in the notice (the ‘date of conversion’).

5.99 The *Inquiries Act* (UK) provides that, before converting an inquiry in this way, the relevant minister needs to consult the chair of the original inquiry.⁸⁵ The minister also needs to consult with the chair of the inquiry before providing him or her with terms of reference that differ from those provided to the original inquiry.⁸⁶

5.100 In DP 75, the ALRC proposed that a similar mechanism should be included in the *Inquiries Act*. The ALRC proposed that this mechanism should provide for the conversion of Official Inquiries into Royal Commissions.⁸⁷ It also noted that the mechanism also should make clear what process needs to be followed in the case of such a conversion.⁸⁸

5.101 As discussed elsewhere in this Report, an inquiry’s exercise of coercive powers may seriously impact on the rights of individuals. The extent of the coercive powers available to Royal Commissions, and the partial abrogation of the privilege against self-incrimination, are reasons why Royal Commissions should be established only in extraordinary circumstances. In the ALRC’s view, therefore, it is not desirable for the executive to establish a Royal Commission on the basis that the inquiry *may* require access to these powers. It would be preferable for the executive to establish an Official

83 *Inquiries Act 2005* (UK) s 15. See also Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [4.48].

84 *Inquiries Act 2005* (UK) ss 15, 16.

85 *Ibid* s 15(3).

86 *Ibid* s 15(7).

87 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–3. Liberty Victoria supported this proposal: Liberty Victoria, *Submission RC 26*, 27 September 2009.

88 *Ibid*, [5.84].

Inquiry, and if it transpires that the inquiry actually requires the more extensive powers of a Royal Commission, convert the Official Inquiry into a Royal Commission.

5.102 The ALRC recommends that the Governor-General should provide his or her consent for a conversion from an Official Inquiry to a Royal Commission. This is consistent with the ALRC's recommendation in Chapter 6 that the Governor-General should be the authority that establishes a Royal Commission.⁸⁹ There is no need to require the consent of inquiry members, as they should not be able to prevent a conversion between inquiries by withholding consent. The ALRC acknowledges, however, that it is likely that the views of the inquiry members will be canvassed by the executive before a decision to convert the Official Inquiry to a Royal Commission is made. The ALRC is also of the view that the minister who established the Official Inquiry should not be required to consent to the conversion of the inquiry to a Royal Commission.⁹⁰ In practice, the Governor-General acts on the advice of the Federal Executive Council, and as a practical matter the view of a single minister is unlikely to override those of the several ministers who form the Council.

5.103 The recommended mechanism should also apply to converting inquiries commenced outside the recommended statutory framework into Royal Commissions. Further, the Australian Government should be able to convert an inquiry established other than under the *Inquiries Act* into an Official Inquiry.

Recommendation 5-3 The recommended *Inquiries Act* should include a mechanism that allows the Australian Government, in accordance with other provisions of the Act:

- (a) with the consent of the Governor-General, to convert an Official Inquiry into a Royal Commission;
- (b) to convert an inquiry established other than under the recommended Act into an Official Inquiry; and
- (c) with the consent of the Governor-General, to convert an inquiry established other than under the recommended Act into a Royal Commission.

89 Recommendation 6-2.

90 In Ch 6, the ALRC recommends that a minister should be able to establish an Official Inquiry.

Accountability mechanisms for inquiries

5.104 An issue raised late in this Inquiry was whether there should be accountability mechanisms for federal public inquiries. McKenzie suggested that the exercise of inquiry powers should be subject to some form of oversight.

The ICAC [Independent Commission Against Corruption in New South Wales] has benefited from the establishment of the position of Inspector to the ICAC. People who have concerns about the operation of the ICAC can go to this office and these concerns can be resolved, to the benefit of individuals, the ICAC and the community. The mere existence of this accountability mechanism enhances the care that commission operatives take in their activities.⁹¹

5.105 McKenzie went on to suggest that:

If a broad based anti-corruption agency was established at a Commonwealth level, with an Office of the Inspector overseeing it, a government could under revised legislation for commissions of inquiry designate the inspector of the anti-corruption agency as the inspector for the ad hoc commission of inquiry.⁹²

5.106 Another issue is whether there should be some mechanism to review inquiry findings. Professor Geoffrey Lindell has suggested that the executive should be able to seek non-binding advice on the need for a new inquiry on part or all of the subject of a previous inquiry.⁹³

5.107 As noted above, the ALRC is considering arrangements for public inquiries established on an ad hoc basis. The desirability of establishing a 'broad based' anti-corruption body at the federal level is outside the Terms of Reference for this Inquiry.

5.108 With respect to Royal Commissions and Official Inquiries, it is the ALRC's view that existing accountability mechanisms are sufficient. First, Royal Commissions and Official Inquiries are established by the executive and are therefore ultimately accountable to the Parliament according to the convention of responsible government.⁹⁴ Secondly, some decisions made by Royal Commissions and Official Inquiries may be subject to judicial review.⁹⁵ Thirdly, an oversight body of the nature proposed by McKenzie may be seen as impacting adversely on the independence of Royal Commissions and Official Inquiries. Further, as discussed in Chapter 7, if the executive disagrees with the recommendations made by a Royal Commission or Official Inquiry, it is not bound to implement those recommendations. If the executive is seriously concerned about the findings made by an inquiry that it established, or the way in which that inquiry exercised its powers, there is no reason why it could not

91 D McKenzie, *Submission RC 27*, 28 September 2009.

92 *Ibid.*

93 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 84.

94 Responsible government is discussed further in Ch 6.

95 In Ch 14, the ALRC discusses the types of matters in inquiries that may be subject to judicial review, for example, breaches of procedural fairness.

conduct its own evaluation of an inquiry, and if it deems it necessary, establish another inquiry to consider such issues.⁹⁶

5.109 The ALRC also notes that a number of bodies have expertise in oversight of the exercise of coercive powers by certain bodies. In certain circumstances, it may be useful for a Royal Commission or Official Inquiry to seek advice from bodies such as ACLEI, IGIS or the Commonwealth Ombudsman. Such assistance may be provided on an informal basis, or it could be provided by staff seconded to an inquiry.

96 An example of this is the Inquiry into the Centenary House Lease (2004), which was established under the *Royal Commissions Act 1902* (Cth) to consider, in part, the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House (1994). The terms of reference for the Inquiry into the Centenary House Lease required the Inquiry to consider, amongst other things, 'whether the resources provided to the 1994 Inquiry, the absence of counsel assisting, or the particular processes adopted, adversely affected the 1994 Inquiry'. Note that the first Royal Commission was established by the Keating Labor Government, and the second was established by the Howard Coalition Government.